

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

**ENTERED**  
TAWANA C. MARSHALL, CLERK  
THE DATE OF ENTRY IS  
ON THE COURT'S DOCKET

IN RE:

e2 COMMUNICATIONS, INC.

Debtor.

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Case No. 02-30574-BJH-11

**MEMORANDUM OPINION**

Came before the Court Munsch Hardt Kopf & Harr, P.C. and Andrews & Kurth, L.L.P.'s (collectively the "Applicants") "First Interim and Final Application For Allowance of Compensation and Reimbursement of Expenses" (the "Application"), filed on May 12, 2003, and the Applicants' "Supplement to the Application," filed on July 7, 2003. After consideration of all the parties' papers and arguments at a hearing held on July 7, 2003, the Court, exercising its core jurisdiction under 28 U.S.C. §§ 157(b)(2)(A) & (O) and 1334, submits the following findings of fact and conclusions of law under Bankruptcy Rules 7052 and 9014.

**STANDARD FOR REASONABLE COMPENSATION UNDER THE BANKRUPTCY CODE**

To determine reasonable compensation under 11 U.S.C. § 330(a) for professional services rendered, a court must determine the "nature and extent of the services supplied by" the professionals. 11 U.S.C. § 330(a)(3); *In re First Colonial Corp. of Am.*, 544 F.2d 1291, 1299 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977). In addition, a court must also assess the value of the services. These two factors comprise the components for the lodestar calculation. *See Cobb v. Miller*, 818 F.2d 1227, 1231 (5th Cir. 1987). Generally, the lodestar is calculated by multiplying the number of hours reasonably expended by reasonable hourly rates. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The court may then adjust the compensation based on the factors of § 330(a)(3) and (4) and the *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), factors. *Blanchard v. Bergeron*, 489 U.S. 87, 91-92 (1989). The *Johnson* factors may be relevant for adjusting the lodestar calculation but no one factor can substitute for the lodestar. *Id.* Rather, the lodestar shall be presumed to establish a reasonable fee with adjustments made when required by specific evidence. *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 554-55 (1986).

## THE APPLICATION AND THE SUPPLEMENT TO THE APPLICATION

Munsch Hardt Kopf & Harr, P.C. (“MHKH”) and Andrews & Kurth, L.L.P. (“A&K”) have filed a final application and supplement to the final application seeking allowance of fees and reimbursement of expenses for representing the former Chapter 11 Trustee in this case, Robert A. Carringer (the “Trustee”). The Applicants request fees of \$381,930.00<sup>1</sup> and expenses of \$32,522.39.<sup>2</sup> Monarch Capital Partners, L.L.C., Chris S. Carter, J. Wade Browne, Ian J. Bonner and Email Partners, L.L.C. (collectively “Email Partners”) filed an objection to the Application, Karen G. Nicolaou (“Nicolaou”), who at the time served as Trustee for both the Litigation Trust and Creditors’ Trust, filed a limited objection to the Application, and the United States Trustee (“US Trustee”) filed a comment to the Application.

Email Partners’ objection to the Applicants’ fee application is based on the fact that the requested fees are almost four times what Email Partners requested as a substantial contribution claim despite both parties working together on the case, that the Applicants estimated their fees in the Third Amended Disclosure Statement to be \$240,000.00, that certain of the services rendered by the Applicants should have been performed by the Trustee, and that there is no justification for the increase in hourly rates charged after the Trustee’s counsel moved from MHKH to A&K. Nicolaou’s limited objection was filed in order to suggest that any order on the Application contain certain language preserving any claims that the Litigation Trust and Creditors’ Trust may have against the Applicants. The US Trustee’s comment was based on the excessiveness of certain time entries, inadequate descriptions of certain fees and expenses, the inclusion of multiple attorneys in conferences, depositions and hearings, the research done on the Trustee’s personal tax liability, and fees charged for work on severance issues where no Court approval was sought prior to commencing the work.

The Court sustains Nicolaou’s limited objection and will include the requested language in the order on the Application. As to Email Partners’ objection, the Court sustains the objection in part and overrules the objection in part. The Court overrules the objection as to its grounds that the Application is four times what Email Partners requested as a substantial contribution claim, that the estimated fees were only \$240,000.00, and that the Applicants rendered services

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<sup>1</sup> This figure consists of \$49,829.50 for MHKH and \$332,100.50 for A&K, the latter being further broken down into \$316,883.00 for the Application and \$15,217.50 for the Supplement to the Application.

<sup>2</sup> This figure consists of \$5,752.84 for MHKH and \$26,769.55 for A&K, the latter being further broken down into \$25,918.10 for the Application and \$851.45 for the Supplement to the Application.

that should have been performed by the Trustee. Despite the Applicants and Email Partners working together to formulate a plan of reorganization, the Application and the substantial contribution claim are not dependent upon one another and each must be evaluated on its own merits irrespective of the ratio of requested fees between the two. In addition, while the Court would like all professionals to keep their fees as reasonable and low as possible, the Applicants are not prohibited from recovering fees above the \$240,000.00 estimated in the Third Amended Disclosure Statement if those fees are reasonable and provide a benefit to the estate. Finally, as counsel for the Trustee, the Applicants are required to perform services for the Trustee that the Trustee cannot perform for himself, most notably the legal work for the Trustee, but they are not to be compensated for performing duties that the Trustee should perform himself.

The Court sustains Email Partners' objection as to its ground that there is no justification for the increase in hourly rates charged after the Trustee's counsel moved from MHKH to A&K. When the Court approved MHKH as counsel for the Trustee, the primary attorneys involved were Gogi Malik ("Malik") and Dean Ferguson ("Ferguson"), who charged \$210.00 and \$365.00 per hour respectively. After moving to A&K, Malik's hourly rate increased to \$225.00 and then \$270.00 and Ferguson's hourly rate increased to \$435.00. While the Court cannot stop attorneys from moving firms and taking certain business with them, hourly rate is part of the calculus this Court considers when approving estate professionals and the tasks that they will perform. Here, in its March 21, 2002 order approving MHKH as counsel for the Trustee, the Court approved Malik and Ferguson's hourly rates at the \$210.00 and \$365.00 figures listed in Ferguson's attached declaration. However, the Court did not approve the rates charged by Malik and Ferguson upon joining A&K. In fact, the Court was not even apprised of the fact that their hourly rates would be increased as no increase was mentioned in the May 24, 2002 motion to substitute counsel. It was not until the Trustee filed his June 3, 2002 amendment to the motion to substitute counsel that the Court was given notice of the intent to raise Malik's hourly rate to \$225.00 and Ferguson's hourly rate to \$385.00. However, there is no order approving this amendment to the application to employ, with the May 28, 2002 order authorizing the Trustee to employ A&K referencing the \$210.00 and \$365.00 figures contained in Ferguson's original declaration. As § 330(a)(1)(A) only allows for "reasonable compensation," the Court finds the hourly rate increases to be unreasonable and illogical. Adjusting Malik and Ferguson's hourly

rates to the rates that they charged while at MHKH reduces Malik's charges to \$117,637.00<sup>3</sup> and Ferguson's charges to \$135,333.00<sup>4</sup> for their time charged at A&K.

Further justifying the reduction to Malik and Ferguson's hourly rate for their time charged at A&K is the difference in blended hourly rate charged by MHKH and A&K. During the time MHKH represented the Trustee a \$256.99 blended hourly rate was charged, a rate that includes paraprofessionals. However, after A&K was engaged to represent the Trustee a \$288.31<sup>5</sup> blended hourly rate was charged, a rate that also includes paraprofessionals. After recalculation based on the above reductions in hourly rates for Malik and Ferguson, A&K's blended hourly rate with paraprofessionals is lowered to \$256.95. Though A&K provides excellent legal services to its clients, including the Trustee, there is not such an appreciable difference between the legal services provided by them and MHKH to justify the difference in blended hourly rate. Thus, the Court finds that the hourly rate increases incurred when counsel for the Trustee moved from MHKH to A&K are not "reasonable compensation" and provide no benefit to the estate. Therefore, the Court reduces Malik's fees to \$117,637.00 and Ferguson's fees to \$135,333.00 for their time charged at A&K, reducing A&K's overall fees charged from \$332,100.50 to \$284,580.50.

In addition, the Court finds that A&K's work on severance and vacation issues where no Court approval was sought prior to commencing the work, noted by the US Trustee in his comment, is not compensable. In this instance, attorneys for A&K determined that payment to employees of the Debtor for severance and vacation was in the ordinary course of the Debtor's business and chose to make payments without Court approval. Only after this Court found out about the payments and, in light of the Fifth Circuit's opinion in *Lasky v. Phones For All, Inc.* (*In re Phones For All, Inc.*), 288 F.3d 730 (5th Cir. 2002), questioned the actions of the responsible attorneys did A&K chose to file a motion for approval of these payments. However, despite the Court approving the payments *nunc pro tunc*, the Court informed the attorneys for A&K that the

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<sup>3</sup> The Court calculated this figure by taking 524.1, the actual hours billed on the Application, and multiplying it by \$210.00 to get \$110,061.00. From there, the Court took the time from the Supplement to the Application, 79.7, and multiplied it by \$210.00 to get \$16,737.00. Then \$16,737.00 was subtracted from \$21,519.00, which is the sum of 79.7 and \$270.00, to get \$4,782.00. Then the Court subtracted \$4,782.00 from \$12,358.00 to get \$7,576.00. The Court then added \$110,061.00 and \$7,576.00 together to get \$117,637.00.

<sup>4</sup> The Court calculated this figure by taking 402, the actual hours billed, and multiplying it by \$365.00 to get \$146,730.00. Then \$146,730.00 was subtracted from \$174,870.00, which is the sum of 402 and \$435.00, to get \$28,140.00. Then the Court subtracted \$28,140.00 from \$163,473.00 to get \$135,333.00.

<sup>5</sup> This blended hourly rate was calculated using the Application and the Supplement to the Application.

services provided were undertaken without Court approval and thus the fees and expenses incurred were subject to being reduced or even denied for damage done to the estate by the payments. The Court notes that A&K could have come to the Court on an emergency basis in order to seek approval of the payments and the severance policy. They chose not to. Therefore, the Court finds that the \$20,452.50 charged by A&K for employee matters is disallowed in its entirety, further reducing A&K's overall fees charged from \$284,580.50 to \$264,128.00.

In addition to the above reductions, the Court also finds that many of the Applicants' fees and expenses are unreasonable and non-compensable under § 330(a)(1)(A), namely those issues commented on by the US Trustee, including excessive time entries, inadequate descriptions of certain fees and expenses, inclusion of multiple attorneys in conferences, depositions and hearings, and research done on the Trustee's personal tax liability.<sup>6</sup> The Court finds that the following fees of A&K are either disallowed or reduced:

Disallowed: 5/7/02-\$360.00, 5/14/02-\$1,125.00, 5/16/02-\$130.50, 5/24/02-\$17.50, 7/2/02-\$202.50, 7/8/02-\$130.50, 7/29/02-\$435.00, 7/30/02-\$292.50, 1/14/03-\$459.00, 1/15/03-\$189.00, 1/17/03-\$434.50, 5/16/02-\$217.50, 5/9/02-\$187.50, 5/16/02-\$652.50, 5/17/02-\$217.50, 8/20/02-\$22.50, 4/24/02-\$675.00, 6/12/02-\$565.50, 9/10/02-\$152.00 & \$304.00, 9/11/02-\$532.00, \$114.00 & \$247.50, 1/15/03-\$162.00, 1/29/03-\$594.00, 1/21/03-\$72.00, 1/22/03-\$54.00, 2/14/03-\$432.00, 2/16/02-\$189.00, 2/17/03-\$135.00 & \$96.00, 2/18/03-\$624.00 & \$540.00, 2/19/03-\$1,026.00, 2/20/03-\$243.00, 2/21/03-\$513.00, 2/26/03-\$144.00, 2/28/03-\$192.00 & \$108.00, 3/3/02-\$48.00 & \$270.00, 3/4/03-\$504.00 & \$504.00, 3/5/03-\$336.00, \$432.00 & \$270.00, 3/6/03-\$783.00 & \$108.00, 3/7/03-\$36.00, \$120.00 & \$108.00, 3/11/03-\$1,593.00, 3/12/03-\$1,701.00, 3/13/03-\$702.00, 3/17/03-\$1,809.00, 3/27/03-\$189.00, 4/15/03-\$270.00, 6/3/02-\$348.00, 6/18/02-\$3,741.00, 6/24/02-\$2,044.50, 6/28/02-\$1,479.00 & \$1,102.50, 7/5/02-\$391.50, 7/18/02-\$478.50, 11/5/02-\$202.50, 11/6/02-\$112.50, 11/7/02-\$180.00, 3/25/03-\$675.00, 3/28/03-\$27.00, 12/3/02-\$22.50, 1/24/03-\$297.00, 4/3/03-\$324.00, 4/4/03-\$1,053.00, 4/22/03-\$1,134.00, 5/8/02-\$174.00, 7/13/02-\$787.50, 7/14/02-\$1,620.00. The total amount of these disallowed fees is \$39,264.50.

Reduced by one-fourth: 5/7/02-\$174.00, 5/13/02-\$217.50, 5/15/02-\$739.50 & \$495.00, 5/17/02-\$517.50, 5/24/02-\$174.00, 5/31/02-\$382.50, 6/12/02-\$67.50 & \$217.50, 6/13/02-\$90.00, 6/14/02-\$157.50, 7/5/02-\$45.00, 7/10/02-\$45.00, 7/30/02-\$1,044.00, 9/9/02-\$112.50, 9/10/02-\$202.50, 2/10/03-\$54.00, 3/18/03-\$135.00, 4/8/03-\$162.00, 5/7/02-\$130.50, 6/17/02-\$135.00, 6/25/02-\$90.00, 6/27/02-\$45.00, 8/26/02-\$135.00, 4/1/03-\$135.00, 5/6/02-\$522.00, 5/7/02-\$1,305.00 & \$135.00, 5/8/02-\$696.00 & \$835.00, 5/9/02-\$157.50, 5/17/02-\$337.50, 6/17/02-\$562.50, 6/18/02-\$1,080.00, 6/19/02-\$720.00, 6/20/02-\$435.00, 6/25/02-\$609.00, 6/28/02-\$478.50, 7/2/02-\$90.00, 7/5/02-\$67.50, 7/9/02-\$135.00, 7/12/02-\$565.50, 7/16/02-\$135.00, 7/31/02-\$90.00, 8/13/02-\$90.00,

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<sup>6</sup> Some issues as to taxes were so simplistic and recurrent that they should have been known to any attorney practicing bankruptcy law.

8/14/02-\$67.50, 8/16/02-\$202.50, 8/22/02-\$112.50, 8/23/02-\$67.50, 9/11/02-\$337.50, 4/20/02-\$1,131.00, 4/21/02-\$2,784.00, 4/22/02-\$3,958.50, 4/23/02-\$1,740.00, 4/24/02-\$4,785.00, 4/25/02-\$1,740.00, 4/29/02-\$1,710.00, 4/29/02-\$3,262.50, 4/30/02-\$3,480.00 & \$1,845.00, 5/1/02-\$4,698.00 & \$2,632.00, 5/2/02-\$3,870.00 & \$1,827.00, 5/3/02-\$2,175.00 & \$1,395.00, 5/6/02-\$913.50 & \$540.00, 6/7/02-\$1,044.00, 6/11/02-\$565.50, 6/13/02-\$435.00, 7/1/02-\$609.00, 9/13/02-\$435.00, 6/3/02-\$696.00, 6/4/02-\$652.50, 6/5/02-\$696.00, 6/12/02-\$522.00, 6/12/02-\$1,522.50, 6/28/02-\$391.50, 7/8/02-\$435.00, 7/10/02-\$652.50, 7/18/02-\$348.00, 8/2/02-\$1,087.50, 9/18/02-\$480.00, 9/19/02-\$112.50 & \$336.00, 10/2/02-\$384.00, 10/3/02-\$736.00, 6/14/02-\$652.50, 7/24/02-\$957.00, 7/25/02-\$1,131.00, 7/29/02-\$652.50, 7/31/02-\$1,131.00, 8/1/02-\$696.00, 8/2/02-\$1,522.50, 8/5/02-\$1,218.00, 8/6/02-\$1,914.00, 8/7/02-\$1,000.50, 8/8/02-\$1,827.00, 8/9/02-\$945.00, 8/12/02-\$922.50, \$2,740.50 & \$565.50, 8/23/02-\$1,479.00 & \$697.50, 8/14/02-\$3,262.50 & \$1,620.00, 8/15/02-\$3,610.50 & \$1,822.50, 8/21/02-\$652.50, 5/21/02-\$217.50, 6/17/02-\$1,348.50 & \$630.00, 7/9/02-\$1,087.50, 9/10/02-\$112.50, \$190.00 & \$1,406.00, 2/10/03-\$864.00, 2/11/03-\$702.00 & \$576.00, 3/10/03-\$594.00, 4/26/02-\$90.00, 5/8/02-\$87.00, 5/10/02-\$435.00, 5/16/02-\$304.50 & \$337.50, 5/20/02-\$913.50, 5/24/02-\$826.50, 5/28/02-\$478.50, 6/3/02-\$130.50, 6/6/02-\$1,479.00, 6/7/02-\$2,262.00, 6/10/02-\$565.50, 6/13/02-\$478.50, 6/17/02-\$2,566.50, 6/19/02-\$3,219.00, 6/20/02-\$2,958.00, 6/21/02-\$2,305.50, 6/25/02-\$1,395.00, 6/26/02-\$2,218.50, 6/27/02-\$2,262.00, 7/1/02-\$304.50, 7/2/02-\$157.50, 7/3/02-\$45.00, 7/5/02-\$90.00, 7/10/02-\$202.50, 8/16/02-\$1,479.00, 8/19/02-\$2,305.50 & \$855.00, 8/20/02-\$1,350.00 & \$3,306.00, 8/21/02-\$3,306.00 & \$877.50, 8/22/02-\$1,597.50, 8/22/02-\$3,436.50, 8/23/02-\$1,348.50, 8/27/02-\$1,479.00 & \$472.50, 8/28/02-\$2,001.00 & \$1,665.00, 8/30/02-\$435.00, 9/11/02-\$1,348.50 & \$405.00, 9/12/02-\$2,566.50 & \$1,174.50, 9/13/02-\$1,000.50 & \$517.50, 10/1/02-\$67.50, 10/2/02-\$697.50, 10/3/02-\$495.00, 10/4/02-\$337.50 & \$1,104.00, 10/7/02-\$697.50, 6/3/02-\$1,435.50, 6/5/02-\$435.00, 6/11/02-\$2,044.50, 6/13/02-\$1,087.50, 6/14/02-\$2,436.00, 6/25/02-\$1,566.00, 7/3/02-\$522.00, 7/17/02-\$913.50, 8/29/02-\$522.00, 10/17/02-\$1,035.00, 10/18/02-\$1,507.50, 10/20/02-\$1,372.50, 10/21/02-\$1,485.00, 10/22/02-\$1,170.00, 10/23/02-\$675.00, 10/24/02-\$1,147.50, 10/28/02-\$562.50, 10/31/02-\$450.00, 10/1/02-\$697.50, 11/4/02-\$922.50, 11/8/02-\$135.00, 11/13/02-\$135.00, 11/14/02-\$67.50, 11/18/02-\$67.50, 11/19/02-\$45.00, 11/20/02-\$270.00, 11/21/02-\$270.00, 11/22/02-\$135.00, 11/25/02-\$405.00, 12/2/02-\$1,260.00, 1/16/03-\$648.00, 1/17/03-\$81.00, 1/29/03-\$351.00, 1/30/03-\$837.00, 2/20/03-\$1,026.00, 3/6/03-\$405.00, 3/10/03-\$432.00, 3/13/03-\$81.00, 3/14/03-\$108.00, 3/28/03-\$837.00, 4/3/03-\$135.00, 4/10/03-\$1,998.00, 4/23/03-\$297.00, 4/24/03-\$567.00, 4/9/03-\$459.00, 6/13/02-\$390.00, 10/5/02-\$260.00, 11/22/02-\$382.50, 11/26/02-\$180.00, 4/1/03-\$459.00, 4/2/03-\$513.00, 4/14/03-\$459.00, 4/28/03-\$243.00, 4/30/03-\$1,674.00, 5/9/02-\$913.50, 5/15/02-\$1,044.00, 12/3/02-\$112.50, 12/10/02-\$472.50, 12/19/02-\$337.50, 1/3/03-\$54.00, 3/18/03-\$1,836.00, 3/19/03-\$1,863.00, 7/15/02-\$1,260.00. The total amount of these reduced fees is \$54,260.25.

In addition, the Court finds that the following expenses of A&K are either disallowed or reduced:

Disallowed: overtime-\$940.00, non-working meals-\$3.00, \$61.05, \$1.50 & \$9.17. The total amount of these disallowed expenses is \$1,014.72.

Reduced by one-fourth: research-\$2,096.07. The total amount of these reduced expenses is \$524.02.

After including these disallowances and reductions, A&K's fees are further reduced from \$264,128.00 and allowed at \$170,603.25, and A&K's expenses are reduced from \$26,769.55 and allowed at \$25,230.81.

The Court also finds that the following fees of MHKH are either disallowed or reduced:

Disallowed: 2/27/02-\$1,281.00, 2/28/02-\$1,281.00 & \$96.00, 3/5/02-\$1,095.00, 3/9/02-\$400.00, 3/11/02-\$420.00, 3/14/02-\$80.00, 3/7/02-\$73.00, 3/12/02-\$365.00, 3/13/02-\$260.00, 3/19/02-\$1,095.00, 4/2/02-\$336.00, 4/11/02-\$100.00, 4/3/02-\$2,555.00, 4/9/02-\$766.50, 4/18/02-\$315.00, 3/25/02-\$140.00, 4/2/02-\$200.00, 4/16/02-\$2,263.00, 4/1/02-\$160.00 & \$84.00, 4/4/02-\$63.00, 3/15/02-\$320.00. The total amount of these disallowed fees is \$13,748.50.

Reduced by one-fourth: 3/13/02-\$460.00, 3/14/02-\$1,825.00, 3/27/02-\$360.00, 3/28/02-\$180.00, 4/8/02-\$100.00, 4/15/02-\$234.00, 3/29/02-\$900.00 & \$1,277.50, 4/1/02-\$949.00 & \$1,176.00, 4/2/02-\$1,277.50 & \$987.00, 4/3/02-\$1,092.00, 4/4/02-\$609.00 & \$803.00, 4/5/02-\$584.00, 4/8/02-\$1,460.00, 4/11/02-\$438.00, 4/12/02-\$1,569.50, 4/16/02-\$401.50, 4/18/02-\$766.50, 4/19/02-\$1,934.50 & \$1,176.00, 3/20/02-\$1,460.00, 3/25/02-\$1,460.00, 3/26/02-\$680.00, 3/27/02-\$441.00, 4/15/02-\$2,153.00, 4/5/02-\$800.00, 4/15/02-\$861.00, 4/3/02-\$162.00. The total amount of these reduced fees is \$7,144.25.

Additionally, the Court finds that the following expenses of MHKH are either disallowed or reduced:

Disallowed: overtime-\$600.00. The total amount of these disallowed expenses is \$600.00.

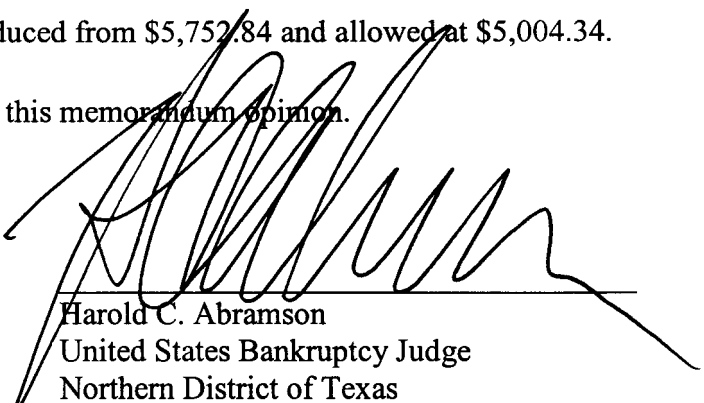
Reduced by one-fourth: research-\$593.99. The total amount of these reduced expenses is \$148.50.

After including these disallowances and reductions, MHKH's fees are reduced from \$49,829.50 and allowed at \$28,936.75, and expenses are reduced from \$5,752.84 and allowed at \$5,004.34.

A separate order will be entered consistent with this memorandum opinion.

**SEP 05 2003**

Signed this \_\_\_\_ day of September, 2003.



Harold C. Abramson  
United States Bankruptcy Judge  
Northern District of Texas